A **MULTI-CODE ELECTRONICS INDUSTRIES (M) BHD & ANOR**

v.

B **GORDON TOH CHUN TOH & ORS**

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SUIT NO: D8-22-453-2008]
20 MAY 2009

C ***CIVIL PROCEDURE:*** *Mareva injunction - Application for - Inter partes application to prevent defendants from removing, disposing, dealing with or diminishing value of assets in or outside of Malaysia - Whether first and second defendants breached fiduciary duty as directors of* D *company - Whether there was a risk of dissipation - Whether there was a good, arguable case for Mareva injunction - Whether granted - Companies Act 1965, s. 132*

CIVIL PROCEDURE: *Injunction - Anton Piller order - Whether to* E *be set aside - Essential pre-conditions for making of Anton Piller order - Whether satisfied - Whether plaintiffs presented strong prima facie case for Anton Piller order*

The *inter partes* hearing of the plaintiffs' application for Mareva injunction (encl. 7) and the *inter partes* hearing of the second F defendant's application to set aside the Mareva injunction and the Anton Piller order (encl. 19) were taken together. The plaintiff had sought to, *inter alia,* restrain the first, second, fourth, fifth, sixth, seventh, eighth, tenth, eleventh defendants from removing from Malaysia any of their assets or disposing of or dealing with or G diminishing the value of their assets whether they were in or outside of Malaysia. The plaintiffs' claim in this action was (i) against the first and second defendants on the tort of breach of fiduciary duty of directors at common law under s. 132 of the Companies Act 1965 and (ii) against the rest of the defendants H for fraud arising out of the acts of the first and second defendants. Only the second defendant opposed the plaintiffs' application; the other defendants did not appear to oppose the plaintiffs' application. According to the plaintiff, the first and second defendants had been appointed on 23 March 2007 as directors of I the first and second plaintiffs. On the same day a resolution was

passed by the board changing the bank signatories of the plaintiffs whereby the first and second defendants were made joint signatories. Between 26 and 28 March 2007, a sum of RM31 million had been uplifted jointly by the first and second defendants from the plaintiffs' bank accounts and paid out to some of the other mentioned defendants. According to the plaintiffs, no notice was given to the board of directors regarding the movement of this said sum bearing in mind that the resolution given was a change of signatory and no authority to uplift the amount. It was the plaintiffs' contention that the second defendant had been shown to have participated in a dishonest misappropriation of funds. The plaintiffs thus submitted that it had a good arguable case for Mareva injunction and a strong *prima facie* case for Anton Piller. The second defendant, however, submitted that he was authorised to uplift the monies for the first defendant to invest the funds to generate higher returns and argued that the plaintiffs had failed to disclose the minutes of 29 March 2007 which gave the first and second defendants the authority to uplift the monies. The second defendant further argued that there was no proof that money had gone to the second defendant's account. It was the second defendant's case that there was no strong arguable or strong *prima facie* case to justify the grant of Mareva injunction and Anton Piller since there was no evidence that the second defendant was part of a conspiracy to defraud the plaintiffs.

Held (order in terms of application in encl. 7; dismissing encl. 19 with costs):

(1) The plaintiffs had made out a *prima facie* case of breach of fiduciary duty as directors of the plaintiffs and for conspiracy to defraud the plaintiffs. The second defendant, by a company resolution passed on 23 March 2007, was only made a co-signatory of the plaintiffs' bank accounts together with the first defendant. The resolution, however, did not authorize them to withdraw the company's fund for the purpose of any investment anywhere. At a subsequent board meeting on 29 March 2007, the minutes showed that the second defendant had played a major role to empower the first defendant to seek and identify new business avenues and to authorize him to determine and deem fit to establish new businesses for and on behalf of the company. This was followed up at the same meeting on the next agenda by the

proposal of the first defendant that he and the second defendant were authorised to place any excess funds of the company into trust funds or bonds in the name of the company jointly. Not a word was said of the fact that they had withdrawn the RM31 million. Hence, it was legitimate to draw an adverse inference that they were acting in concert to steal the monies of the plaintiffs. (para 12)

(2) A director of a company is required under s. 132 of the Companies Act 1965 'to at all times act honestly and use reasonable diligence in the discharge of the duties of his office.' The plaintiffs had shown sufficient cause that it had a good arguable case to show that they had a fair chance of obtaining judgment against the defendants. The other element which the court needed to enquire into was whether there was a risk of dissipation. The monies were withdrawn dishonestly for they were withdrawn without the authority of the Board. Thus, the risk of dissipation must be presumed under the circumstances. (para 12)

(3) The failure of the plaintiffs to disclose the minutes of the board meeting of 29 March 2007 and of 25 September 2007 did not affect the plaintiffs' case as they were clearly not material given the incontrovertible evidence that the monies had been withdrawn even before the second meeting. Further, the minutes contained no ratification on the part of the board implied or otherwise of the act of the first and second defendants with respect to all or a part of the monies taken out for the purpose of investment for at no time did the defendants provide at the meetings a detailed account of how and where all the monies were invested to enable the plaintiffs to ratify the act of the first and second defendants. (para 12)

(4) The three essential pre-conditions for the making of an Anton Piller order were satisfied. They were (i) an extremely strong *prima facie* case; (ii) the damage, potential or actual, was very serious for the plaintiff and (iii) there was clear evidence that the defendants had in their possession incriminating documents or things and a real possibility that they may destroy such material before any application inter parties could be made. The plaintiffs were not in possession of the documents or things which would enable them to prove and to trace the

monies allegedly taken from them. As an alleged co-perpetrator, it was presumed that the second defendant must have in his possession such records of where those monies were kept or sent. It followed as a matter of plain deduction that in the ordinary course of human conduct that there was a tendency for a person who perpetrated a crime who did not own up to cover or destroy evidence of his wrongdoing. (para 14)

(5) The plaintiffs have presented a strong *prima facie* case for Anton Piller and a good arguable case for Mareva injunction. Both the Mareva injunction and Anton Piller order had been justly applied for. There was no reason why they should be set aside. Also, based on the affidavits filed by the plaintiffs to support their application in respect of encl. 7 to justify the orders sought, this court was satisfied that an order for Mareva injunction should be granted against the first and third to eleventh defendants who were absent in this proceeding. (paras 18 & 19)

Case(s) referred to:

Anton Piller KG v. Manufacturing Processes Ltd and Others [1976] 1 All ER 779 ***(refd)***

Dunlop Holdings Ltd & Dunlop Ltd v. Staravia Ltd [1982] Com LR 3 ***(refd)***

Patterson v. BTR Engineering (Aust) Ltd and Others [1989] 18 NSWLR 319 ***(refd)***

Royal Brunei Airlines Sdn Bhd v. Tan [1995] 3 All ER 97 ***(refd)***

Yousif v. Salama [1980] 3 All ER 405 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 132

Other source(s) referred to:

Malaysian High Court Practice 2001 edn, p 1004

For the plaintiffs - G Rajasingam (RS Nathan & Daphne Koo with him); M/s Shearn Delamore & Co

For the 2nd defendant - Alvin Tang (Faisal Moideen & Aaron Mathews with him); M/s Shook Lin & Bok

For the 6th defendant - Hari Haran; M/s Wan Sharizal Hari & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Kang Hwee Gee J:

[1] Enclosure 7 (the *inter partes* hearing of the plaintiffs' application or mareva injunction) and encl. 19 (the *inter partes* hearing of the 2nd defendant's application to set aside the mareva injunction and the anton piller order) are taken together.

[2] In this encl. 7 application the plaintiffs seek the following orders:

1. That the 1st defendant, whether by himself, his agents, his servants, his licensees or any of them or otherwise howsoever be hereby restrained and an Order be hereby issued restraining the 1st Defendant whether by himself, his agents, his servants, his licensees or any of them or otherwise howsoever from doing any of the following until the full disposal of the present action or a further order by this Honourable Court:

   (a) removing from Malaysia any of his assets which are in Malaysia whether owned legally or beneficially by him and whether in his own name or not and whether solely or jointly owned up to the value of RM44,190,597.82 ("the 1st Enjoined Limit"); and

   (b) disposing of or dealing with or diminishing the value of any of his assets whether they are in or outside of Malaysia whether owned legally or beneficially by him and whether in his own name or not and whether solely or jointly owned up to the 1st Enjoined Limit and that this prohibition includes without affecting the generality of the foregoing assets and all properties of the 1st Defendant including but not limited to the monies standing in the credit of the 1st Defendant's Bank Account, being Public Bank Account No.: 3142196823.

2. That the 2nd Defendant, whether by himself, his agents, his servants, his licensees or any of them or otherwise howsoever be hereby restrained and an Order be hereby issued restraining the 2nd Defendant whether by himself, his agents, his servants, his licensees or any of them or otherwise howsoever from doing any of the following until the full disposal of the present action or a further order by this Honourable Court:

   (a) removing from Malaysia any of his assets which are in Malaysia whether owned legally or beneficially by him

and whether in his own name or not and whether solely or jointly owned up to the 1st Enjoined Limit; and

(b) disposing of or dealing with or diminishing the value of any of his assets, whether they are in or outside of Malaysia whether owned legally or beneficially by him and whether in his own name or not and whether solely or jointly owned up to the 1st Enjoined Limit and that this prohibition includes without affecting the generality of the foregoing asset and all properties of the 2nd Defendant.

3. That the 4th Defendant, whether by themselves, their agents, their servants, their licensees or any of them or otherwise howsoever be hereby restrained and an Order be hereby issued restraining the 4th Defendant whether by themselves, their agents, their servants, their licensees or any of them or otherwise howsoever from doing any of the following until the full disposal of the present action or a further order by this Honourable Court:

(a) removing from Malaysia any of the 4th Defendant's assets which are in Malaysia whether owned legally or beneficially by the 4th Defendant and whether in the 4th Defendant's own name or not and whether solely or jointly owned up to the value of RM20,009,917.82 ("the 2nd Enjoined Limit"); and

(b) disposing of or dealing with or diminishing the value of any of the 4th Defendant's assets whether they are in or outside of Malaysia whether owned legally or beneficially by the 4th Defendant and whether in the 4th Defendant's own name or not and whether solely or jointly owned up to the 2nd Enjoined Limit, and that this prohibition includes without affecting the generality of the foregoing assets, all properties of the 4th Defendant, including but not limited to the monies standing in the credit of the 4th Defendant's Bank Account, being Ambank Account No.: 001-201101500-3.

4. That the 5th Defendant, whether by themselves, their agents, their servants, their licensees or any of them or otherwise howsoever be hereby restrained and an Order be hereby issued restraining the 5th Defendant whether by themselves, their agents, their servants, their licensees or any of them or otherwise howsoever from doing any of the following until the full disposal of the present action or a further order by this Honourable Court:

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(a) removing from Malaysia any of the 5th Defendant's assets which are in Malaysia whether owned legally or beneficially by the 5th Defendant and whether in the 5th Defendant's own name or not and whether solely or jointly owned up to the value of RM4,200,000.00 ("the 3rd Enjoined Limit"); and

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(b) disposing of or dealing with or diminishing the value of any of the 5th Defendant's assets whether they are in or outside of Malaysia whether owned legally or beneficially by the 5th Defendant and whether in the 5th Defendant's own name or not and whether solely or jointly owned up to the value the 3rd Enjoined Limit, and that this prohibition includes without affecting the generality of the foregoing assets, all properties of the 5th Defendant.

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5. That the 6th Defendant, whether by themselves, their agents, their servants, their licensees or any of them or otherwise howsoever be hereby restrained and an Order be hereby issued restraining the 6th Defendant whether by themselves, their agents, their servants, their licensees or any of them or otherwise howsoever from doing any of the following until the full disposal of the present action or a further order by this Honourable Court:

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(a) removing from Malaysia any of the 6th Defendant's assets which are in Malaysia whether owned legally or beneficially by the 6th Defendant and whether in the 6th Defendant's own name or not and whether solely or jointly owned up to the value of RM9,075,010.00 ("the 4th Enjoined Limit"); and

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(b) disposing of or dealing with or diminishing the value of any of the 6th Defendant's assets whether they are in or outside of Malaysia whether owned legally or beneficially by the 6th Defendant and whether in the 6th Defendant's own name or not and whether solely or jointly owned up to the value the 4th Enjoined Limit, and that this prohibition includes without affecting the generality of the foregoing assets, all properties of the 6th Defendant, including but not limited to the monies standing in the credit of the 6th Defendant's Bank Account, being Maybank Bank Account No. 5645-5417-4368.

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6. That the 7th Defendant, whether by herself, her agents, her servants, her licensees or any of them or otherwise howsoever be hereby restrained and an Order be hereby issued restraining the 7th Defendant whether by herself, her agents, her servants, her licensees or any of them or

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otherwise howsoever from doing any of the following until the full disposal of the present action or a further order by this Honourable Court:

(a) removing from Malaysia any of her assets which are in Malaysia whether owned legally or beneficially by her and whether in her own name or not and whether solely or jointly owned up to the value of RM2,550,000.00 ("the 5th Enjoined Limit"); and

(b) disposing of or dealing with or diminishing the value of any of her assets whether they are in or outside of Malaysia whether owned legally or beneficially by her and whether in her own name or not and whether solely or jointly owned up to the 5th Enjoined Limit, and that this prohibition includes without affecting the generality of the foregoing asset, all properties of the 7th Defendant, including but not limited to the monies standing to the credit of the 7th Defendant's Bank Accounts, under the name of "Ronix Enterprise" being Maybank Bank Account No. 50101143-1960 and Maybank Account No. 5146-0016-2902.

7. That the 8th Defendant, whether by himself, his agents, his servants, his licensees or any of them or otherwise howsoever be hereby restrained and an Order be hereby issued restraining the 8th Defendant whether by himself, his agents, his servants, his licensees or any of them or otherwise howsoever from doing any of the following until the full disposal of the present action or a further order by this Honourable Court:

(a) removing from Malaysia any of his assets which are in Malaysia whether owned legally or beneficially by him and whether in his own name or not and whether solely or jointly owned up to the value of RM2,560,000 ("the 6th Enjoined Limit"); and

(b) disposing of or dealing with or diminishing the value of any of his assets whether they are in or outside of Malaysia whether owned legally or beneficially by him and whether in his own name or not and whether solely or jointly owned up to the 6th Enjoined Limit, and that this prohibition includes without affecting the generality of the foregoing asset, all properties of the 8th Defendant, including but not limited to the monies standing in the credit of the 8th Defendant's Bank Account, under the

name of "Uni Orient Enterprise" being Maybank Bank Account No. 51408845-8040 and Public Bank Account No. 3132998003.

8. That the 10th Defendant, whether by himself, his agents, his servants, his licensees or any of them or otherwise howsoever be hereby restrained and an Order be hereby issued restraining the 10th Defendant whether by himself, his agents, his servants, his licensees or any of them or otherwise howsoever from doing any of the following until the full disposal of the present action or a further order by this Honourable Court:

(a) removing from Malaysia any of his assets which are in Malaysia whether owned legally or beneficially by him and whether in his own name or not and whether solely or jointly owned up to the value of RM31,009,917.82 ("the 7th Enjoined Limit"); and

(b) disposing of or dealing with or diminishing the value of any of his assets whether they are in or outside of Malaysia whether owned legally or beneficially by him and whether in his own name or not and whether solely or jointly owned up to the 7th Enjoined Limit, and that this prohibition includes without affecting the generality of the foregoing asset, all properties of the 10th Defendant.

9. That the 11th Defendant, whether by himself, his agents, his servants, his licensees or any of them or otherwise howsoever be hereby restrained and an Order be hereby issued restraining the 11th Defendant whether by himself, his agents, his servants, his licensees or any of them or otherwise howsoever from doing any of the following until the full disposal of the present action or a further order by this Honourable Court:

(a) removing from Malaysia any of his assets which are in Malaysia whether owned legally or beneficially by him and whether in his own name or not and whether solely or jointly owned up to the value of the 7th Enjoined Limit; and

(b) disposing of or dealing with or diminishing the value of any of his assets whether they are in or outside of Malaysia whether owned legally or beneficially by him and whether in his own name or not and whether solely or jointly owned up to the 7th Enjoined Limit, and that this prohibition includes without affecting the generality of the foregoing asset, all properties of the 11th Defendant.

10. That prayers 1 to 9 apply to all of the Defendants' assets whether or not they are in their own names and whether they are solely or jointly owned. For the purpose of this Order, the Defendants' assets include any asset which the Defendants have the power, directly or indirectly, to dispose of or deal with as if it were the Defendants' own. The Defendants are to be regarded as having such power if a third party holds or controls the asset in accordance with the Defendants' direct or indirect instructions.

11. That if the total unencumbered value of the respective Defendants' assets in Malaysia exceeds the respective Enjoined Limits the respective Defendants may remove any of those assets from Malaysia or may dispose of or deal with them so long as the total unencumbered value of their respective assets still in Malaysia remains above the value the respective Enjoined Limits.

12. That if the total unencumbered value of the respective Defendants' assets in Malaysia does not exceed the respective Enjoined Limits, the respective Defendants must not remove any of those assets from Malaysia and must not dispose of or deal with any of them, but if the respective Defendants have other assets outside Malaysia the respective Defendants' may dispose of or deal with those assets so long as the total unencumbered value of all their assets whether in or outside Malaysia remains above the value the respective Enjoined Limits.

13. That the terms of the Order do not affect or concern persons outside of the jurisdiction of this Court until it is declared enforceable by or is enforced by a Court in the relevant country and that they are to affect the person only to the extent that the Orders have been declared enforceable or have been enforced unless the person is:

    (a) a person to whom the Order is addressed or an officer or an agent appointed by power of attorney of that person; or

    (b) a person who is subject to the jurisdiction of this Court and:

    (c) has been given written notice of the Order at his residence or place of business within the jurisdiction of this Court; and

    (d) is able to prevent acts or omissions outside the jurisdiction of this Court which constitute or assist in a breach of terms of the Order.

14. That nothing in this Order shall, in respect of the Defendants' assets located outside Malaysia, prevent any third party from complying with:

(i) what it reasonably believes to be its obligations, contractual or otherwise, under the laws and obligations of the country or state in which those assets are situated or under the proper law of any contract between itself and the Defendants; and

(ii) any Order of the Courts of that country or state, provided that reasonable notice of any application for such an Order is given to the Plaintiffs' Solicitors.

15. That for the purposes of securing compliance by each Defendant with the provisions of the Order to be made hereon:

(a) Each Defendant shall deliver up to the person who serves the Order to be made hereon on him all charge cards, credit cards, debit cards, automatic teller machine cards, electronic funds transfer cards, cheque books, passbooks or other payment tokens or documents howsoever described whereby a liability actual or contingent could be created by or on behalf of such defendant or funds drawn by or on behalf of such defendant in diminution or extinction of his assets.

(b) Each Defendant must inform the Plaintiffs in writing, within 48 hours upon service of the Order, of:

(i) all the Defendants' respective assets whether in or outside Malaysia and whether owned legally or beneficially by them and whether in their own name or not and whether solely or jointly owned, giving the value, location and details of all such assets, including but not limited to monies referred to in paragraphs 1 to 9; and

(ii) the name and address of all persons including financial institution holding any such assets;

(i) the names and numbers of all bank or financial institution accounts holding any such assets together with the name and address where such bank or financial institution account is held, in whose name and the amount in such account;

(ii) the details of all trusts which have received any of such assets including the names and addresses of the trustees.

(c) That the information referred to in paragraphs 15(b) must be confirmed in an affidavit sworn or affirmed by the Defendants, which must be served on the Plaintiffs' Solicitors within 4 days after the Order has been served on the Defendants.

[3] The plaintiffs' claim in this action:

- against 1st and 2nd defendants is on the tort of breach of fiduciary duty of directors at common law and under s. 132 of the Companies Act 1965;
- against the rest of the defendants for fraud arising out of the acts of 1st and 2nd defendants.

[4] Only the 2nd defendant appeared by his counsel to oppose the plaintiffs' application. The other defendants did not appear to oppose the plaintiffs' application.

[5] The facts justifying the application can be gleaned from the submissions of counsel for the plaintiffs Mr. G. Rajasingam and counsel for the 2nd defendant Mr. Alvin Tang as follows:

[6] Mr. G. Rajasingam for the plaintiffs:

Plaintiffs' first cause of action in respect of 1st and 2nd defendants - breach of fiduciary duty of directors both at common law and Section 132 of the Companies Act 1965 - see paragraphs 55 to 59 of the amended Statement of Claim.

Plaintiff's second cause of action in respect of all defendants is for fraud. See paragraphs 60 to 61 of the amended Statement of Claim. 1st defendant is the CEO/MD non-independent executive director and 2nd defendant independent, non-executive and deputy chairman of the board of directors. The 3rd defendant is the assistant manager of the 1st plaintiff and an employee of the 4th defendant. The 4th defendant is a company incorporated in Singapore. The 1st defendant is also a director of the 4th defendant up to 30.5.2007. The 5th defendant is a company incorporated in Hong Kong and the 1st defendant was a shareholder and a director of the 5th defendant up to 27.3.2007. The 6th defendant is a private limited company corporated in Malaysia in 2006 and was one of the many receivers of the monies drawn out from the plaintiffs' account. The 7th and 8th defendants are sole proprietors offering management services and are one of the receivers of the plaintiffs' monies. The 9h defendant is a company registered in Virgin Island as an investment company in whom the plaintiffs' money was deposited on an escrow account. The 10th defendant is a Malaysian who

was declared a bankrupt four times over. He has claimed to be an employee of the 9th defendant and the corporate adviser of the 1st plaintiff according to his calling card. The 11th defendant is a Malaysian individual. He claims to be a director of the 9th defendant. The suit against the 12th defendant has been discontinued.

The plaintiffs' third cause of action is for conspiracy to defraud as against all defendants as pleaded in paragraphs 62 to 63 of the amended Statement of Claim.

The fourth cause of action is knowing assistance in furtherance of dishonest breach of trust as against the 2nd, 4th to the 11th defendants where they assisted the 1st and 2nd defendants in reference to the breach of trust.

Our claim is for the sum of RM44,188,262.82. The money was stolen by 4 different transactions as follows:

1) The 1st category of transaction of RM29,009,917.80 was paid out by the plaintiffs to the following defendants - the 4th defendant received RM18,009,917.82, the 6th defendant RM8 million and the solicitor who was the 12th defendant RM3 million.

   They were paid out purportedly pursuant to an escrow agreement entered into between the 1st plaintiff and the 9th defendant. The mechanics of how the fraud was perpetrated is described in paragraphs 15 to 27 of the amended Statement of Claim and the supporting affidavit.

2) The 2nd category of transaction of RM2 million paid out to the 4th defendant pursuant to a supplementary escrow agreement dated 30.3.2007 for purposes of investment in a non-existence fund called Equatorial Fund. Basically from the USDS million purportedly advanced by the 4th and 6th defendants a sum of USD1.5 million was to be invested in the Equatorial Fund for the benefit of the 2nd plaintiff and in return the 1st plaintiff paid out the RM2 million to the 4th defendant by way of settlement for the purported advances of the 4th and 6th defendants. See paragraphs 28 to 34 of the amended Statement of Claim and in the supporting affidavit.

3) The 3rd category of transaction of RM4.2 million - basically the 1st plaintiff was to be registered in the New York Stock Exchange under the ADR (American Depository Receipt) Programme which enables a non US company to trade in the New York Stock Exchange by the sale and purchase of ADR Receipt. To facilitate this purported registration the 5th

defendant was appointed as a facilitator and to facilitate the registration a sum of RM4.2 million was transferred to the 7th and 8th defendants acting as intermediaries of the 8th defendant in Hong Kong. Of the RM4.2 million, RM2 million was paid out to the 7th defendant and balance RM2.2 million was paid out to the 8th defendant by way of individual payment of not more than RM300,000.00 between 22.5.2007 to 20.7.2007. The 1st defendant was the director of the 5th defendant, a company registered in Hong Kong with a paid up capital of HKD10,000.00. See paragraphs 35 to 43 of the amended Statement of Claim and in the supporting affidavit.

4) The 4th category of transaction consisted of numerous withdrawals of the 1st plaintiff's bank account and the sum involved is RM8,978,345.00 of which RM5.5 million went to the 1st defendant, RM140,000 went to the 4th defendant, RM1.07 million went to the 6th defendant, RM550,000.00 to the 7th defendant and RM360,000.00 to the 8th defendant. See paragraphs 51 to 54 of the amended Statement of Claim and in the supporting affidavit.

The involvement of the 1st and 2nd defendants in this claim:

1) They were both appointed on the same day 23.3.2007 as directors of the 1st and 2nd plaintiffs. On the same day a resolution was passed by the board changing the bank signatories of the plaintiffs. For the current account sum below RM300,000.00 the 1st defendant was the sole signatory. For sums more than RM300,000.00 both 1st and 2nd defendants were joint signatories. For the fixed deposit account both the 1st and 2nd defendants were joint signatories. Between 26th and 28th of March 2007 a sum of RM31 million had been uplifted jointly by the 1st and 2nd defendants from the plaintiffs' 5 bank accounts as stated in paragraphs 19 and 20 of the amended Statement of Claim and in the supporting affidavit, purportedly pursuant to the escrow agreement dated 29.3.2007 and the supplementary escrow agreement dated 30.3.2007 and paid out to the 4th, 6th and the former 12th defendants. No notice was given to the board of directors regarding the movement of this sum RM31 million bearing in mind that the resolution given on the 23.3.2007 was a change of signatory and no authority to uplift the amount. There was no amendment to the 23.3.2007 minutes and was confirmed on the 29.3.2007 Board of Directors' meeting. The fact that the 1st and 2nd defendants were appointed as directors and signatories of the plaintiffs' bank accounts was disclosed in the amended

Statement of Claim and in the supporting affidavits. See paragraphs 57.2 of the amended Statement of Claim and paragraph 64 in the supporting affidavit.

2) The second board of directors' meeting was convened on 29.3.2007. At this meeting see item 3 of the minutes the 1st defendant suggested that the plaintiffs' market be extended to Korea, East Europe and Thailand. Immediately the 2nd defendant proposes a motion that: "THAT authority be and is hereby given to Mr. Gordon Toh Chun Toh to seek and identify new business avenues for the Company to invest and that he is authorized to determine and deem fit to establish new businesses for and on behalf of the Company." In the next discussion on the agenda the 1st defendant proposes a reduction of the company's expenses and moots the idea of investing the plaintiffs' surplus funds into trust funds and bonds to enable the company to earn higher interest income. Gordon says that he proposed to report the investment status of the excess funds in the fixed deposit accounts (if any) at the next board meeting. Immediately the 2nd defendant proposes the second motion. It reads as follows: "THAT the two Directors of the Company, namely Mr. Gordon Toh Chun Toh and Dato' Abul Hasan bin Mohamed Rashid (himself) be and are hereby authorized to place any excess funds of the Company into trust funds or bonds in the name of the Company JOINTLY." At this juncture it is to be noted that what Gordon Toh was authorized to do was only to identify and establish new business for the company but the authority to invest the funds in trust funds and bonds in the name of the company must be exercised JOINTLY. Both the motions were carried. On this date the 1st and 2nd defendants failed to disclose that they had already moved earlier the RM31 million purportedly under the escrow agreement and the supplementary escrow agreement which the 1st defendant had signed the escrow agreement on 29.3.2007 and the supplementary escrow agreement on 30.3.2007. This is damning evidence against the 1st and 2nd defendants on their perpetration of fraud against the plaintiffs - having been appointed only two working days before the first withdrawal. See paragraphs 57.3 to 57.5 of the amended Statement of Claim and paragraph 64 of the supporting affidavit.

3) The plaintiffs' failure to disclose the 29.3.2007 minutes do not amount to a material non disclosure because we have alluded to paragraphs 57.3 to 57.5 of the amended Statement of Claim and paragraph 64 of the supporting affidavit. On hindsight we should have further addressed our points that

the resolution passed on the 29.3.2007 authorised the 1st and 2nd defendants to invest the plaintiffs' funds jointly and not just the 1st defendant.

4) The third board meeting took place on 27.6.2007. The minutes of 29.3.2007 were adopted without amendment in relation to the two motions. Even at this stage the movement of RM31 million, the existence of the escrow agreement and the supplementary escrow agreement was not disclosed to the board. Also by this time, RM3.8 million out of RM4.2 million had been paid to the 7th and 8th defendants was not disclosed to the board.

5) The fourth board meeting on 25.9.2007 - there was a circular resolution pertaining to the ratification of the appointment of the 9th defendant as the escrow agent was not ratified by the board for the following reasons: (i) that the supplementary agreement was not tabled to the board despite request that it should be presented for its scrutiny; (ii) that the mechanics of the appointment of the 9th defendant as the escrow agent under the supplementary agreement should be first explained to the board of directors; (iii) that the supplementary agreement was not enclosed together with the circular resolution and the circular resolution was not signed by all directors pertaining to the ratification of the appointment of escrow agent. The board also expressed concern that the supplementary agreement would be made with the offshore company. The minutes of the board meeting shows that the company would be advancing the sum of USD1.5 million to its subsidiary for investment in the 9th defendant when in fact the settlement sum of RM2 million had been disbursed to the 1st defendant's own company that is to say the 4th defendant. There is clearly no ratification of the appointment of the 9th defendant as escrow agent in this board meeting (as submitted by counsel for the 2nd defendant). On the contrary all that the minutes of the meeting record at the end of the meeting was that the board approved the investment, subject to all regulations, Bank Negara guidelines having been met and complied with. This is not a ratification as to the appointment of the 9th defendant as the escrow agent.

6) The fifth board meeting on 29.11.2007 - plaintiffs' external auditors' report that they are unable to confirm the early date of the transaction with respect to the foreign investment and also the purported ADR registration to trade in the New York Stock Exchange and therefore had to submit qualified accounts for the year ending 31.7.2007 as the auditors

A cannot find supporting documents or obtain satisfactory explanation on the investment. After hearing the 1st defendant the board resolved that all overseas deposits be recalled and redeposited into the plaintiffs' bank accounts by close of business on 30.11.2007. At the same time Ernst and Young was appointed to undertake an investigative audit of the transactions.

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7) The sixth board meeting on 10.12.2007 - the board clearly went on record to state that no approval was given for placement of deposits offshore. That the escrow agreement was never referred to the board for approval and that the board did not ratify the earlier directors' circular resolution because it was not signed by all directors as required by the Articles. The board emphasized that there was no approval for placement of deposit offshore. The main escrow agreement was not referred to it and the bank signatories were changed. Authorised limits of the directors were reduced and the 2nd defendant was removed from being a signatory.

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8) The last board meeting on 31.12.2007 - confirms the minutes of the 29.11.2007 and 10.12.2007.

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With respect to the risk of dissipation on the Mareva Injunction which we obtained, we submit that if the 2nd defendant has been shown to have participated in a dishonest misappropriation of funds and this would impliedly show that there was a risk of dissipation of asset should the plaintiffs be successful in their action. See *Patterson v. BTR Engineering (Aust) Ltd and Others* [1989] 18 NSWLR 319 per Gleeson CJ where it was held that "where a *prima facie* case of dishonesty involving diversion of money from its proper channels" is made out, "this would justify the conclusion that there was a danger that the appellant would dispose of the assets in order to defeat the judgment."

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A similar principle also applies in Anton Piller. See *Dunlop Holdings Ltd & Dunlop Ltd v. Staravia Ltd* [1982] Com.L.R. 3 per Justice Oliver of the English Court of Appeal:

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> Although in the original *Anton Piller* case there was clear evidence of the possibility that the evidence might be destroyed, it has certainly become customary to infer the probability of disappearance or destruction of evidence where it is clearly established on the evidence before the court that the defendant is engaged in a nefarious activity which renders it likely that he is an untrustworthy person. It is seldom that one can get cogent or actual evidence of

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> a threat to destroy material or documents, so it is necessary for it to be inferred from the evidence which is before the court.

See also *Yousif v. Salama* [1980] 3 All ER 405 at 406 per Lord Denning MR:

> But in this case there is evidence (if it is accepted) which shows the defendant to be untrustworthy. The plaintiff has a legitimate fear that the documents will be destroyed.

We have a strong *prima facie* case for Anton Piller and a good arguable case for Mareva Injunction.

[7] Mr. Alvin Tang for the 2nd defendant:

1. Orders against 2nd defendant both Mareva and Anton Piller.

2. Obtained merely on the premise that the 2nd defendant (former non executive director and former deputy chairman although bank signatory to plaintiffs' account) had without authorization uplifted the plaintiffs' deposit. Our position is that he is authorized to uplift the monies for the 1st defendant (former managing director) to invest the funds to generate higher returns. Only two sums are involved with respect to the 2nd defendant. The sum of RM29 million from the fixed deposits of 1st plaintiff's bank accounts and the sum of RM2 million from the 2nd plaintiff's bank accounts. Evidence of authority to uplift: Minutes of board meeting on 29.3.2007 Exhibit "AH-1" - page 51: "That the two Directors of the Company, namely Mr. Gordon Toh Chun Toh (1st defendant) and Dato' Abul Hasan Bin Mohamed Rashid (2nd defendant - my client) be and are hereby authorized to place any excess funds of the Company into trust funds or bonds in the name of the Company Jointly." Also in this meeting Gordon Toh (1st defendant) was authorized "to seek and identify new business avenues for the Company to invest and that he is authorized to determine and deem fit establish new businesses for and on behalf of the Company." (They had in the previous board meeting on 23.3.2007 been made directors and signatories of the plaintiffs but the authority to uplift was only given on 29.3.2007. The money was uplifted between 26.3.2007 and 28.3.2007.) The 2nd defendant's position on this is that 2nd defendant had been given authority to uplift even at the first directors' meeting on 23.3.2007 although this is not stated.

3. The plaintiffs had failed to disclose the minutes of 29.3.2007 which gave the 2nd defendant and 1st defendant the authority to uplift the monies. Instead in the plaintiffs' claim they have specifically stated no approval given when in fact approval was given on 23.3.2007 and subsequently confirmed on the 29.3.2007. This is a serious non disclosure which must necessarily render both the restraining orders invalid.

4. In any case the 2nd defendant is only given the power to uplift but not to decide on the manner of investment which rests solely with the 1st defendant. This fact itself was not disclosed.

5. Three months after obtaining the restraining orders the plaintiffs proceeded to amend the statement of claim by stating that the uplifts were effected without prior approval. Whereas the original merely says no approval. This shows that they had deliberately concealed the fact that the board at some point in time given the authority to uplift.

6. 2nd defendant did not take the money or benefits. All he did was withdrew the money and gave it to the 1st defendant to invest. So the money restrained did not come from the plaintiffs. Hence no Mareva Injunction. See *Raja Letchumi a/p Ramarajoo v. The Hongkong & Shanghai Banking Corporation* [1989] 1 CLJ 691; [1989] 1 CLJ (Rep) 146 per Mohamed Yusoff SCJ - money not traced to the account so injuncted and the injunction was dissolved.

7. After the money withdrawn from plaintiffs' account RM31 million they were invested by the 1st defendant's two escrow agreements (1 main, 1 supplementary). Now the supplementary agreement was subsequently ratified at the board meeting on 25.9.2007 and so by implication this would mean also the ratification of the main agreement, thereby rendering the escrow agreement lawful and therefore making the withdrawal lawful. See minutes of board meeting page 75 of Exhibit "AH-4" following circular resolution circulated by 1st defendant seeking ratification of the supplementary escrow agreement. Exhibits "AH-6" and "AH-7". These ratifications were not made known at the time of applying for an *ex parte* injunction. Hence no disclosure of material facts.

8. The role of the 2nd defendant is restricted to uplift the monies from the account of the plaintiffs given that he was a signatory.

9. No strong arguable or strong *prima fracie* case to justify the grant of Mareva Injunction. Even more so Anton Piller. No real risk of dissipation - we did not receive the money. There is no evidence by affidavit or otherwise that 2nd defendant is part of conspiracy to defraud the plaintiffs.

10. The police report lodged by the plaintiffs' chairman and director did not implicate the 2nd defendant but only the 1st defendant. Exhibit "MN-24" filed on 9.1.2008 (10 months after the event). The 2nd police report filed by the CEO on 28.3.2008 also did not implicate the 2nd defendant.

11. On the part of 2nd defendant at best there is negligence but not fraud and this is insufficient to sustain a Mareva Injunction a *fortiori* an Anton Piller Order.

12. The plaintiffs have also failed to demonstrate any real risk of destruction of documents.

13. My client's only role was to uplift RM31 million as a joint signatory. As such the only cause of action by the plaintiffs against the 2nd defendant relates to this act of uplifting. There is no proof that money had gone to my client's (2nd defendant) account. What the plaintiffs are freezing now is my client's account.

14. The plaintiff has identified the receipients of these monies and they are defendant No. 4, defendant No. 6, defendant No. 5, defendant No. 7, defendant No. 8, defendant No. 12 and 1st defendant but do not include the 2nd defendant.

15. There is non-disclosure of material facts:

    (i) the failure to disclose board minutes of 29.3.2007 which would show approval of uplifting and that it was the 1st defendant that was tasked to invest the monies and to report back the investment status to the board. These minutes were not disclosed in this application by the plaintiffs. It is now disclosed in the affidavit of the 2nd defendant (encl. 18). On the contrary in the Statement of Claim the plaintiffs maintained that there was no approval for the uplifting of the RM31 million. See paragraphs 20 and 24 of the Statement of Claim and in the plaintiffs' 1st affidavit paragraphs 23 and 37;

    (ii) the failure to disclose the board minutes of 25.9.2007 which would have shown that the investment in the supplementary agreement was approved and ratified which by implication would also mean approval of the main escrow agreement. After the board had deliberated

A and expressed concern about the supplementary agreement they finally approved the investment contained therein.

16. My client is at most negligent but there was no intention to defraud because the investment was made by the 1st defendant and his duty is merely to uplift for the 1st defendant to invest.

17. Imputation of dishonesty on the 2nd defendant cannot be made because he never receives the money. Distinguished from *Zarina* and *Patterson* cases where in those cases money was in control of the defendants.

18. Although the amount uplifted by the 2nd defendant was only RM31,009,917.82 the plaintiffs have placed a restrain of RM44,190,597.82. The 2nd defendant my client was not involved in the uplifting of approximately RM13 million save for the sum of RM400,000.00 which was co-signed by the 2nd defendant. This RM13 million comprised of 72 transactions taken out entirely by the 1st defendant. The RM400,000 was co-signed by the 2nd defendant only because the 1st defendant had represented to him that he required the money for purchase of raw materials which the 2nd defendant had assumed was true and hence acted merely on oral representation of the 1st defendant. The 1st defendant is the CEO of the plaintiffs and in charge of the day to day operation.

19. Despite these material facts the plaintiffs avered in paragraph 70(d) and (e) that "I am not aware of the possible answers that may be asserted by the defendants" in response to the requirement of Order 29 rule 2A(d) and (e) which states "The affidavit in support shall contain a clear and concise statement: (d) of any answer asserted by the defendant (or which he is thought likely to assert) either to the claim in the action or to the claim for interlocutory relief; (e) of any facts known to the applicant which might lead the Court not to grant relief *ex parte*;

20. There is no risk of dissipation which is the 2nd limb of the Mareva Injunction. See *Regent Decorators (M) Sdn Bhd & Anor v. Michael Chee & Ors* [1984] 2 CLJ 296; [1984] 2 CLJ (Rep) 441. On imputation of dishonesty leading to assumption of dissipation, see *Tan Liang Chew & Ors v. Public Prosecutor* [1997] 5 MLJ 338 at 340 where KC Vohrah J held that:

(4) The evidence that the second and third accused had signed the cheque without verifying in the first place whether it could be done may amount to negligence on their part but was not sufficient to establish that they were dishonest.

(co-signatories of cheques merely signed the cheques with the perpetrator without the approval of the board - held insufficient to prove dishonesty of the co-signatories although it may amount to negligence.) See also *KMS Advertising PLC & Another v. Singer* where the English Court of Appeal held that "it is not the law that a plaintiff is entitled to an injunction whenever he establishes a good arguable case which may involve dishonesty on the part of a defendant. He is also right in saying that he is not bound to assume that the defendant is likely to dispose of his assets so that they will not be available after judgment, if the defendant's probity is in doubt. He has directed himself correctly in saying that to justify an injunction there must be a real risk of the defendant's disposing of his assets;"

21. *Patterson* case ought to be distinguished from our case as in that case the defendants have control over the funds whereas in the instant case my client has no control over the funds and had not in fact received any of the funds. Plaintiffs had identified all the initial receipients of the monies as the other defendants but not the 2nd defendant. No evidence that he had taken any sum apart from merely signing as a co-signatory of the accounts of the plaintiffs. See K.C. Vohrah J's decision in *Tan Liang Chew*, *supra*, where he held that the mere act of signing cheques without more is insufficient to establish dishonesty. See also *Thane Investments Ltd v. Tomlinson* [2003] EWCA Civ 1272 where Gibson L.J. held at paragraph 28:

> Mr. Blackett-Ord submitted that it has now become the practice ... by pointing to some dishonesty, and that, he says is sufficient to enable this Court to make a freezing order. I have to say that if that has become the practice then the practice should be reconsidered. It is appropriate in each case for the court to scrutinize with care whether what is alleged to have been the dishonesty of the person ... really justifies the inference that the person has assets which he is likely to dissipate ...

22. The conduct post of the 2nd defendant is relevant to consider his honest disposition as for the past 13 months he had been using his personal account which had been subjected to the Mareva Injunction and had been putting

money in and out of this account. See Singapore High Court case in *European Grain & Shipping Ltd v. Compania Naviera Euro-Asia SA & Ors* [1990] 2 MLJ 291 per Chan Sek Keong J at 295:

> The third reason was this. The Mareva injunction merely restrained CNEA from drawing on its bank account with HKSB. Accordingly, there was nothing to prevent CNEA from opening any other account with any other bank in any part of the world, eg, with a bank in Hong Kong where the administrative office of CNEA was situated. Yet, CNEA continued to remit the charterline fees into the bank account which was subject to a Mareva injunction. This was not the conduct of a dishonest defendant and one intent on concealing its assets in order to remove them from the reach of the plaintiffs.

23. On setting aside the Anton Piller see *Arthur Anderson & Co. v. Interfood Sdn Bhd* [2005] 2 CLJ 889 per Richard Malanjum JCA as he then was where material non-disclosure was an issue - latent non compliance with Order 29 rule 1(2A) requiring disclosure of material facts where an application is made *ex parte*. Principally in the present case the non-disclosures were the two minutes of board meetings were not disclosed which we said would have shown that the 2nd defendant was given authority to uplift the funds and that the supplementary escrow agreement was ratified. In so far as my client's alleged culpability is concerned he had only signed out as a joint signatory the sum of approximately RM31 million but plaintiffs' affidavit had asked for a restraining order up to the upper threshold of approximately RM44 million. It should have been disclosed to the court that in so far as my client is concerned only upper threshold of RM31 million had been allegedly dissipated.

24. Anton Piller must show that there was a real risk of destruction of documents. See *Booker McConnell pic and Another v. Plascow and Others* [1985] R.P.C. 425 where the Court of Appeal *held interpreted the words "real possibility" of destruction of documents to mean "to be contrasted with the extravagant fears which seem to afflict all plaintiffs". It would appear that the Court of Appeal of England and Wales would only accept clear evidence of risk of destruction rather than relying on the general feelings that the documents would be destructed. No conduct of the 2nd defendant to show that he would destroy documents or any evidence. Here all documents which bear the name of any of the defendants in his office or his house had been seized

under Anton Piller. See paragraph 27 of the Order. If they had taken a miss-step my client would have to wait until completion of trial.

2nd defendant had committed negligence at most

[8] Reply by Mr G Rajasingam:

Apply the test in *Anton Piller KG v. Manufacturing Processes Ltd And Others* [1976] 1 All ER 779 at 784:

> There are three essential pre-conditions for the making of such an order, in my judgment. First, there must be an extremely strong *prima facie* case. Secondly, the damage, potential or actual, must be very serious for the plaintiff. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application *inter partes* can be made.

the three criteria as applied in *Arthur Anderson*, *supra*; and also *Dunlop Holdings Ltd, supra*. Note: cheque of RM240,000.00 signed by the 2nd defendant Exhibit "MN-32" of Enclosure 41 paragraph 50 found in the possession of 10th defendant.

As far as jurisdiction to issue Anton Piller is concerned, court has always restricted requirement to only one essential criterion of material non-disclosure. Otherwise wait until trial when the defendants can claim damages. We had already submitted non-disclosure. No such non-disclosure.

On the submission that the 2nd defendant is only involved up to RM31 million plus plus, please note our claim is against all defendants based on conspiracy and we have tabulated the quantum in paragraph 75(xiii) Enclosure 59 the Amended Statement of Claim. Please note Section 132(1) of the Companies Act 1965 the duty of directors - "shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office" - see House of Lords' judgment in *Twinsectra Ltd v. Yardley And Others* [2002] 2 All ER 377 at 386:

Further, Lord Nicholls said:

> Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct. Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at

A the time. The court will also have regard to personal attributes of the third party such as his experience and intelligence, and the reason why he acted as he did. '(See [1995] 3 All ER 97 at 107, [1995] 2 AC 378 at 391.)'

B **[9]** Reply by Mr. Alvin Tang for the 2nd defendant on the RM240,000 cheque dated 26 August 2004:

See paragraph 41 of affidavit in reply affirmed on 13.6.2008 that the personal transaction is not related to the current dispute - at most it shows that the 2nd defendant knew the 10th defendant.

C **Decision**

[10] For Mareva - apply the test as summarized in *Malaysian High Court Practice 2001* Edition at p. 1004 with the authorities:

D First, there must be a strong prima case against the defendant ... to show a good arguable case, it would generally be sufficient to show on the evidence available that there is a fair chance that the plaintiffs will obtain judgment against the defendants; there is no need to show a case so strong as to warrant summary judgment or even a strong *prima facie* case.

E Secondly, there must be clear evidence that the defendant has assets within jurisdiction ...

Thirdly, there must be a danger that that the defendants assets may be dissipated before judgment ...

F **With Respect To The 1st And 3rd To 11th Defendants Who Failed To Appear:**

[11] Based on the affidavits filed by the plaintiffs to support their G application in respect of encl. 7 to justify the orders sought I am satisfied that an order for Mareva Injunction should be granted against the 1st and 3rd to 11th defendants who are absent in this proceeding. (The suit against the 12th defendant had been discontinued.)

H **With Respect To The 2nd Defendant Who Appeared To Oppose The Application:**

[12] Having considered the affidavits and submissions of the parties I am satisfied that the plaintiffs have made out a *prima facie* I case of breach of fiduciary duty as directors of the plaintiffs and for conspiracy to defraud the plaintiffs as pleaded in their statement of claim. They are sufficient for me to grant the orders sought on the following grounds:

1. It is clear that the 2nd defendant by the company resolution passed on 23 March 2007 was only made a co-signatory of the plaintiffs' bank accounts together with the 1st defendant giving them the authority to withdraw sums above RM300,000 from the company's current and fixed deposit accounts.

2. The resolution it is clear did not authorize them to withdraw out the company's fund for the purpose of any investment anywhere. Yet barely five days after having been made signatories and only a day before the 2nd Board meeting on 29 March 2007 the 1st and 2nd defendants had uplifted sum of RM31,000,000 from the accounts of the plaintiffs.

3. At the board meeting on 29 March 2007, neither the 1st defendant nor the 2nd defendant informed the Board at the meeting that they had uplifted the RM31,000,000 from the plaintiffs' bank accounts. It is clear that the monies had been taken by stealth.

4. It is also clear from the minutes of the second Board meeting on 29 March 2007 that the 2nd defendant played a major role to empower the 1st defendant to "seek and identify new business avenues" and to authorize him "to determine and deem fit to establish new businesses for and on behalf of the company." This was followed up at the same meeting on the next agenda by the proposal of the 1st defendant that he and the 2nd defendant "be and are hereby authorized to place any excess funds of the company into trust funds or bonds in the name of the company Jointly." Given that not a word was said of the fact that they had withdrawn the RM31,000,000 it would be legitimate to draw an adverse inference that they were acting in concert to steal the monies of the plaintiffs.

5. A director of a company is required under s. 132 of the Companies Act 1965 "to at all times act honestly and use reasonable diligence in the discharge of the duties of his office." In assessing the 2nd defendant's culpability it may be appropriate to adopt what Lord Nicholls said in *Royal Brunei Airlines Sdn Bhd v. Tan* [1995] 3 All ER 97; [1995] 2 AC 378 with respect to a person's honesty:

> Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct. Likewise, when called upon to

A decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party such as his experience and intelligence, and the reason why he acted as he did.

B 6. Applying the standard on honesty as alluded to above, I am satisfied that the plaintiffs had shown sufficient cause that it as a good arguable case to show that they have a fair chance of obtaining judgment against the defendants.

C 7. All that the plaintiffs are required to show at this stage is a *prima facie* case that the 2nd defendant had jointly with the 1st defendant withdrawn monies amounting to RM31 million without authority and that he had not done it by accident or ignorance. He may have a defence based on his claim that the D withdrawals were ratified in the subsequent Board meetings. But this is essentially a question which is to be determined at the trial and not at this stage at the hearing of the application for Mareva Injunction.

E 8. The only other element which the court needs to enquire into is whether there is a risk of dissipation. I accept the reasoning of Greeson CJ in *Patterson v. BTR Engineering (Aust) Ltd and Others* [1989] 18 NSWLR 319 (cited by counsel for the plaintiffs) that "where a *prima facie* case of dishonesty involving F diversion of money from its proper channels" is made out, "this would justify the conclusion that there was a danger that the appellant would dispose of the assets in order to defeat the judgment."

G 9. There could be no question that the monies were withdrawn dishonestly for they were withdrawn without the authority of the Board. The risk of dissipation must be presumed under the circumstances.

10. The failure of the plaintiffs to disclose the minutes of the H Board meetings of 29 March 2007 and of 25 September 2007 should not affect the plaintiffs' case as they were clearly not material given the incontrovertible evidence that the monies had been withdrawn even before the second meeting. Further I am unable to read from the two minutes that there is a I ratification on the part of the Board implied or otherwise of the act of the 1st and 2nd defendants with respect to all or a part of the monies taken out for the purpose of investment for

at no time did the defendants provide at the meetings a detailed account of how and where all the monies were invested to enable the plaintiffs to ratify the act of the 1st and 2nd defendants.

11. With respect to the submission of counsel for the 2nd defendant, Mr. Alvin Tang, that the sum of RM44 million sought under the Mareva was in excess of the sum that the 2nd defendant was alleged to have taken. I accept the submission of counsel for the plaintiffs that the plaintiffs' claim is based on conspiracy which must necessarily include any claim against the other defendants as tabulated in para. 75 (xiii) of the amended statement of claim and which must be in excess of RM31,009,917.82.

[13] For Anton Piller:

Apply the test in *Anton Piller KG v. Manufacturing Processes Ltd and Others* [19761 1 All ER 779 at 784:

> There are three essential pre-conditions for the making of such an order. First, there must be an extremely strong *prima facie* case. Secondly, the damage, potential or actual, must be very serious for the plaintiff. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application *inter partes* can be made.

[14] I am satisfied that the pre-conditions alluded to above have been satisfied for Anton Piller on similar grounds and reasons. The plaintiffs were not in possession of the documents or things which would enable them to prove and to trace the monies allegedly taken from them. As an alleged co-perpetrator, it is to be presumed that he must have in his possession such records of where those monies were kept or sent. It follows as a matter of plain deduction that in the ordinary course of human conduct that there is a tendency for a person who perpetrate a crime who does not own up to cover or destroy evidence of his wrong doing.

[15] On the requirement that there must be a real risk of destruction, I would rely on and adopt what Justice Oliver of the English Court of Appeal said in *Dunlop Holdings Ltd & Dunlop Ltd v. Staravia Ltd* [1982] Com. LR. 3:

> Although in the original *Anton Piller* case there was clear evidence of the possibility that the evidence might be destroyed, it has certainly become customary to infer the probability of

A disappearance or destruction of evidence where it is clearly established on the evidence before the court that the defendant is engaged in a nefarious activity which renders it likely that he is an untrustworthy person. It is seldom that one can get cogent or actual evidence of a threat to destroy material or documents, so it is necessary for it to be inferred from the evidence which is before the court.

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[16] I would also adopt what Lord Denning MR said in *Yousif v. Salama* [1980] 3 All ER 405 at 406:

C But in this case there is evidence (if it is accepted) which shows the defendant to be untrustworthy. The plaintiff has a legitimate fear that the documents will be destroyed.

[17] The element of untrustworthiness of the 2nd defendant is to be inferred from his dishonesty as alluded to earlier.

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[18] The plaintiffs have presented a strong *prima facie* case for Anton Piller and a good arguable case for Mareva Injunction. Both the Mareva Injunction and Anton Piller Order have been justly applied for. There is no reason why they should be set aside.

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[19] There shall be an order in terms of the application in encl. 7, and encl. 19 is dismissed with costs.

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